STATE OF SOUTH DAKOTA
DEPARTMENT OF HEALTH

BOARD OF MEDICAL AND OSTEOPATHIC EXAMINERS

IN THE MATTER OF: DECLARATORY RULING REGARDING DELEGATING THE TASK OF WRITING RESPIRATORY CARE ORDERS	)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY RULING

This matter came before the South Dakota Board of Medical and Osteopathic Examiners ("Board") through a petition filed by Board Staff, pursuant to SDCL 1-26-15 and ARSD § 20:78:02. The Petition was filed on February 10, 2017, and requested that the Board enter a declaratory ruling as to the issue noted below. On June 8, 2017, after due and proper notice, a hearing was held regarding the petition at which the Board heard oral testimony regarding the petition. Now, being otherwise informed as to all matters pertinent thereto, the Board enters the following Declaratory Ruling.

ISSUE

May an attending physician for a resident of a long-term care facility delegate the task of writing respiratory care orders to a qualified respiratory care therapist, and is this delegation allowed within the scope of practice of respiratory care practitioners as defined by state law?

FINDINGS OF FACT

1. The United States Department of Health and Human Services ("HHS") issued a final rule for Reform of Requirements for Long-Term Care Facilities. 81

Fed. Reg. 68688 (October 4, 2016). This final rule included language relating to the delegation of authority to respiratory care practitioners to write therapy orders for patients in long-term care facilities. The final rule relating to respiratory care practitioners can be found at 42 CFR § 483.30 and 42 CFR § 483.65.

2. 42 CFR §483 contains the requirements that an institution must meet to qualify to participate as a skilled nursing facility in the Medicare program, and as a nursing facility in the Medicaid program.

3. The stated intent of the HHS rules is "to reflect the substantial advances that have been made over the past several years in the theory and practice of service delivery and safety. These revisions are also an integral part of [HHS's] efforts to achieve broad-based improvements both in the quality of health care furnished through federal programs, and in patient safety while at the same time reducing procedural burdens on providers." *Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68688 (October 4, 2016).

4. People living in long-term care settings generally have complex chronic and acute medical conditions that require an interdisciplinary team to manage.

5. Physicians and respiratory care practitioners work as a team to provide services to residents of long-term care facilities.

6. The attending physician for a resident in a long-term care facility has overall supervisory responsibility for the patient's treatment, and should be aware of all treatments ordered for long-term care patients to prevent counterproductive orders that are not aligned with patients' care goals and needs. The promulgation

and carrying out of therapy orders can have a significant impact on the patient's quality of life.

7. The current prevailing practice in South Dakota is for the attending physician to write and sign therapy orders, or the physician will instruct the respiratory care practitioner to draft therapy orders for the physician to review and sign.

8. The long-term care facility may adopt rules and procedures for the medical team, and attending physicians may issue standing orders or protocols regarding an individual patient's care. A protocol is a standardized plan for medical procedures or the administration of medications, with an outline of specific procedures and medications, by which certain tasks are delegated to South Dakota licensed healthcare professionals whose scope of practice allows the performance of such tasks.

9. Any finding of fact more appropriately labeled a conclusion of law is hereby re-designated as such and incorporated therein below.

CONCLUSIONS OF LAW

1. The Board has the authority under SDCL ch. 36-4, 1-26-15, and ARSD § 20:78:02 to issue declaratory rulings concerning the applicability and interpretation of the Board's statutory and regulatory provisions and the practice of medicine and osteopathy in South Dakota.

2. No person may practice medicine or osteopathy without a license issued under SDCL ch. 36-4. SDCL 36-4-11. A physician may not delegate their

ability to practice medicine or osteopathy to an individual not licensed to practice medicine or osteopathy in South Dakota.

3. A "respiratory care practitioner" is a person licensed or permitted by the state to practice respiratory care as defined by SDCL ch. 36-4C. SDCL 36-4C-1(5).

4. The scope of practice of a respiratory care practitioner is defined in SDCL 36-4C-2 which states:

> Respiratory care defined. Respiratory care is the treatment, management, diagnostic testing, and care of patients with deficiencies and abnormalities associated with the cardiopulmonary system and associated aspects of other systems. Respiratory care includes observing, assessing, and monitoring signs, symptoms, reactions, general behavior, and general physical response of individuals to respiratory care, including determination of whether those signs, symptoms, reactions, behaviors, or general physical response exhibit abnormal characteristics; the administration of pharmacological, diagnostic, and therapeutic agents related to respiratory care; the administration of analgesic agents by subcutaneous injection or inhalation for performance of respiratory care procedures; the collection of blood specimens and other bodily fluids and tissues for, and the performance of, cardiopulmonary diagnostic testing procedures including blood gas analysis; the insertion of maintenance of artificial airways; the insertion of devices to analyze, infuse, or monitor pressure in arterial, capillary, or venous blood; development, implementation, and modification of respiratory care treatment plans based on assessment of the cardio-respiratory system, respiratory care protocols, clinical pathways, referrals and written, verbal, or telecommunicated orders of a physician; application, operation, and management of mechanical ventilatory support and other means of life support; hyper baric oxygen medicine; advances in the art of techniques of respiratory care learned through formal or specialized training; and the initiation of emergency procedures. In order to practice, licensed respiratory care practitioners (RCP) are required to be supervised by a qualified physician medical director.

5. SDCL 36-4C-1(4) requires a respiratory care practitioner to have a Qualified Medical Director who is "responsible for the medical direction of any inpatient or outpatient respiratory care service." SDCL 36-4C-3 requires that respiratory care be performed "in accordance with the prescription or verbal order of a physician…"

6. The change in federal regulations allows an attending physician of a patient in a long-term care facility to delegate to a respiratory care practitioner the task of writing respiratory care orders consistent with 42 CFR § 483.65. 42 CFR § 483.30.

7. Pursuant to 42 CFR § 483.65, respiratory care services "must be provided under the written order of a physician…"

8. Attending physicians may use protocols to allow the respiratory care practitioner to develop a respiratory care plan, but the plan may not be implemented – according to the state scope of practice for a respiratory care practitioner – without the written or verbal order of the attending physician.

9. The South Dakota Board of Medical and Osteopathic Examiners does not have jurisdiction over billing issues for medical services, and makes no findings or conclusions on those matters.

10. Any conclusion of law more appropriately designated a finding of fact is hereby re-designated as such and incorporated therein above.

[*signature on following page*]

Dates this 8th day of March, 2018.

SOUTH DAKOTA BOARD OF MEDICAL AND OSTEPATHIC EXAMINERS

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By: Walter O. Carlson, MD
President